JUDICIAL SYSTEM MONITORING PROGRAMME

PROGRAM PEMANTAUAN SISTEM YUDISIAL

The Court of Appeal Decision on the Applicable Subsidiary Law in Timor-Leste

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The* Judicial System Monitoring Programme *(JSMP) was set up in early 2001 in Dili, East Timor. Through court monitoring, the provision of legal analysis and thematic reports on the development of the judicial system, JSMP aims to contribute to the ongoing evaluation and building of the justice system in East Timor. For further information see www.jsmp.minihub.org

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Table of Contents

2. The Court of Appeal Decision **5**

2.1 Majority Decision **5**

2.2 Dissenting Decision of Judge Jacinta Correia da Costa **6**

3. Subsequent Developments **6**

3.1 Prosecutor General´s Appeal to the Supreme Court **6**

3.2. The Special Panel Decision in the Trial of Domingos Mendonca **6**

3.3 Draft Bill by Members of Parliament **7**

4. JSMP's Analysis and Comment **7**

4.1 The Doctrine of Separation of Powers **7**

4.2 What did UNTAET intend to be the subsidiary law applicable in East Timor following the promulgation of UNTAET Regulation 1999/1? **8**

4.2.1 Historical Development of the Applicable Law in East Timor *8*

4.2.2 Principles of Statutory Interpretation *9*

4.2.3 Additional Indicators that Indonesian Law was intended to be the Applicable Subsidiary Law *10*

4.3 What law forms the applicable subsidiary law in East Timor today? **12**

4.4 What law should properly be applied by the courts when considering criminal charges, commercial transactions and other matters which took place during the 1974 - 1999 Indonesian occupation of East Timor? **12**

5 Conclusions and Suggested Solutions **13**

5.1 Proposals for Clarification and Certainty of Law **13**

1. Executive Summary

On 15 July 2003 the Court of Appeal delivered its decision in the matter of the Public Prosecutor versus Armando dos Santos. This decision marks a watershed in the post-independence development of East Timor's legal system because it decided the applicable subsidiary law in East Timor is the Law of Portugal, rather than Indonesia.[1]

To understand the Court's decision, it is necessary to examine the way in which the law in East Timor has been formed.

The starting point is the "May Fifth Agreement" of 1999 by which the Governments of Indonesia and Portugal agreed that if the East Timorese people voted for independence, each would relinquish all territorial claims to this country. When the Indonesians left East Timor in October 1999 a United Nations transitional administration, UNTAET was created and mandated to 'exercise all legislative and executive authority including the administration of justice'. UNTAET first had to create a new legal framework in East Timor. That was done by UNTAET Regulation 1999/1; Section 3.1 of which relevantly provides:

> "Until replaced by UNTAET regulations or subsequent legislation of [the] democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall [continue to] apply …"

Until the Court of Appeal decision the phrase "the laws applied in East Timor prior to 25 October 1999" had always been understood to refer to Indonesian law. The basis for this was the factual reality that prior to the 25th October 1999 the laws which were *in fact* applied in East Timor were those of Indonesia. The Court of Appeal, however, interpreted this phrase differently to refer to the laws which "validly applied". Because the Indonesian occupation of East Timor was illegal under international law, they said that Indonesian law could not have validly applied, and that consequently, the law imported by UNTAET Regulation 1999/1 is the law of Portugal.

The Court of Appeal's decision has raised two crucially important questions:

(a) What did UNTAET intend to be the subsidiary law applicable in East Timor following the promulgation of UNTAET Regulation 1999/1; and

(b) What law should properly be applied by the courts when considering criminal charges, commercial transactions and other matters which took place during the 1974 - 1999 Indonesian occupation of East Timor?

In addition, the decision has generated an enormous amount of uncertainty, confusion and division within the Courts, East Timorese legal fraternity and community at large regarding the fundamental basis, or source of East Timorese laws.

[1] The Court also found United Nations Regulation 2000/15 governing the conduct of Crimes against Humanity trials to be invalid, and purported to expand the definition of ´genocide under international law. However, this report is limited solely to consideration of the applicable subsidiary law. The other issues will be discussed in a second report examining these issues which JSMP intends to publish in the near future.

This division and uncertainty has been illustrated bythree significant developments:

(a) On 23 July 2003, the Prosecutor-General filed an appeal to the Court of Appeal sitting in its jurisdiction as the Supreme Court seeking (amongst other things) a declaration that Indonesian Law is the applicable subsidiary law in East Timor,

(b) On 24 July 2003, the Special Panel for Serious Crimes issued a decision in the case of *Public Prosecutor v. Joao Sarmento and Domingos Mendonca*, declaring that they did not consider themselves bound by the decision of the Court of Appeal, and that they considered the proper source of subsidiary laws to be the Laws of Indonesia, and

(c) On 29 July 2003, a group of nine Members of Parliament tabled a draft bill in the National Parliament which proposes that Indonesian, and not Portuguese Law be confirmed as the applicable law in East Timor pursuant to UNTAET Regulation 1991/1. The proposed bill is scheduled for debate by the Legislature on Friday, 8 August 2003.

Implications of the Decision for the Law in East Timor -

Subsequent to its decision on 15 July, the Court of Appeal has applied Portuguese law in several subsequent appeal cases. However, as at the date of writing, the Dili District Court, including the Special Panels for Serious Crimes, appear to have decided they are not obliged to follow the Court of Appeal's decision, and are continuing to apply Indonesian law in their decisions.

It is not clear to JSMP whether, in accordance with civil law practice, the decision of the Court of Appeal is necessarily binding on lesser courts. However, what is clear is that opinions on this issue of what should be the applicable law in East Timor differ, and that the duality in practice between the courts (i.e. the District Court and Special Panels determining matters under Indonesian law at first instance, and the Court of Appeal deciding appeals using the Laws of Portugal) means that parties appearing before them can no longer have any certainty as to what constitutes the applicable law in this country, and the basis upon on which cases are decided.

In its broader application, the Court of Appeal decision has the potential to render invalid many transactions conducted in East Timor during the last 28 years because they have been determined under Indonesian, and not Portuguese Law. These would include commercial contracts, registration of births, deaths and marriages, bank loans, bankruptcy proceedings and other matters, such as criminal prosecutions undertaken between December 1974 and 25 October 1999. Taken to its full extent, the Court of Appeal decision has the potential to cause massive disruption to life in East Timor, to business ventures, and to the East Timorese economy.

Given the present uncertainty regarding this fundamental issue of law, JSMP considers that it is incumbent upon the National Parliament to intervene.The purpose of this report is to explain the Court of Appeal´s decision, its consequences on the present law and to make some suggestion as to possible solutions.

2. The Court of Appeal Decision

Armando dos Santos had been convicted of murder pursuant to the *Indonesian Criminal Code* and sentenced to 20 years imprisonment by the Special Panel for Serious Crimes[2] in September 2002. The Public Prosecutor then appealed that decision to the Court of Appeal on the basis that Dos Santos should properly have been convicted of murder as a Crime against Humanity.

2.1 Majority Decision

The Court of Appeal is comprised of a 3 Judge Panel. Its decision, issued on Tuesday, 15 July 2003, was split 2:1. The majority comprising President of the Court of Appeal, Judge Claudio Ximenes and Judge Jose Maria Antunes essentially decided three things.

(a) Indonesian law has never been validly in force in East Timor, and that the applicable subsidiary law (i.e. law used in the absence of East Timorese law promulgated post-independence, or an applicable UNTAET Regulation) according to Section 165 of the Constitution is the Law of Portugal and not the Laws of the Republic of Indonesia.

(b) that United Nations Regulation 2000/15 which forms the basis for prosecution of Crimes Against Humanity in the Special Panel is invalid as it breaches the prohibition in East Timor's Constitution against criminal laws operating ´retroactively´, and

(c) that the crimes of which Armando dos Santos had been found guilty amounted to ´genocide´ under the Portuguese Criminal Code (an offence with which, incidentally, he had not been charged).

Although recognising that the assumption taken by the courts up until the present time had been that Indonesian law should apply as the valid subsidiary law in East Timor, the Court in its decision stated there was no valid judicial basis upon which to make that assumption.

The Court found the Indonesian occupation of East Timor between 1975 and 1999 was unlawful under international law. Consequently, Indonesian law could not ***validly*** be said to be in force in East Timor to 25 October 1999, and that the appropriate law was that of Portugal. In coming to this finding, the Majority of the Court stated at Page 5 of their decision:

> "The 'laws applied in East Timor prior to 25 October 1999' could only be those which, in accordance with the principles of international law, were legitimately in force in that territory (East Timor).
>
> "… Portugal continued to be recognised by the international community, by the United Nations Security Council and by the Timorese People as the Administering Power of East Timor during the period between December 1975 and 25 October 1999.
>
> "…(for this reason) the 'laws applied in East Timor prior to 25 October 1999' could only be the Portuguese law."

[2] The Special Panels for Serious Crimes, a Division of the Dili District Court, were created by UNTAET Regulation 2001/15. Each Panel is comprised of 2 International Judges and 1 East Timorese Judge. Under UNTAET Regulation 2001/15, the Special Panel has exclusive jurisdiction to hear and determine cases involving Crimes Against Humanity and other serious offences committed in East Timor between 1 January 1999 and 25 October 1999.

2.2 Dissenting Decision of Judge Jacinta Correia da Costa

The Court of Appeal decision was not unanimous, as the third panel member, Judge Jacinta Correia da Costa dissented from the majority. Judge Jacinta stated that she found no ambiguity regarding UNTAET´s clear intention to nominate Indonesian law as the applicable subsidiary law. In her view, Article 3 of UNTAET Regulation 1999/1 (when considered against the laws expressly stated to be repealed enumerated in Article 3.2 and 3.3, and the terms of the May 5th Agreement entered between Indonesia, Portugal and the United Nations in 1999) clearly referred to the continued operation of Indonesian law.

For this reason, Judge da Costa held that Indonesian law, and not Portuguese, should remain the applicable subsidiary law. (Further explanation of this is detailed in the ´JSMP Analysis and Comment section¨ of this report).

3. Subsequent Developments

3.1 Prosecutor General´s Appeal to the Supreme Court

On 23 July, the Prosecutor General of Timor Leste, Mr Longuinhos Monteiro, filed a motion with the Court of Appeal sitting in its capacity as the Supreme Court for an appellate review of their decision in the appeal of Armando dos Santos.

The grounds for that motion have not been publicly released. However, JSMP is aware that the motion asserts that the Court of Appeal has made an error in finding Portuguese Law as the applicable subsidiary law, and seeks a declaration from the Supreme Court asserting instead that the valid and applicable subsidiary law is that of Indonesia.

JSMP understands that the appeal has yet to be listed for hearing.

3.2. The Special Panel Decision in the Trial of Domingos Mendonca

On 24 July 2003, the Special Panel for Serious Crimes delivered its decision upon a Defence motion requesting that, in accordance with the Court of Appeal's decision in dos Santos, the Prosecutor should be directed to amend the indictment to reflect Portuguese, rather than Indonesian Law, as being the applicable subsidiary criminal law in Timor Leste.

Interestingly, the Special Panel found that they were not bound by the Court of Appeal's decision. Whilst JSMP does not necessarily agree with the court's reasons for reaching this conclusion (there is an argument to suggest the Special Panel was nevertheless bound)[3], JSMP agrees with the Special Panel's finding that the clear intention of UNTAET in promulgating Section 3 of Regulation 1999/1 was to establish Indonesian Law as the applicable subsidiary law.

In reaching its decision the court referred to the same instruments, and adopted the same general principles of statutory interpretation outlined in the "Analysis and Comment¨section of this report. A full copy of the court's decision is available on the JSMP website (www.jsmp.minihub.org).

[3] Further discussion of this issue will be made in a second report which JSMP intends to release shortly, and which includes a closer analysis of the Court of Appeal decision and its legal consequences for the Courts in East Timor.

3.3 Draft Bill by Members of Parliament

On 29 July, a group of nine Members of Parliament tabled a draft bill in Parliament proposing that a new law be promulgated confirming Indonesian, and not Portuguese Law as the applicable subsidiary law to be applied in East Timor.

The stated purpose of the bill is to resolve the uncertainty generated by the Court of Appeal's decision in the Armando dos Santos case.

JSMP is concerned, however, that the proposed bill has been hurriedly drafted, and in its present form, and does not address all of the legal issues arising from the Court of Appeal's decision. Importantly, the bill states that the law will only have effect from 20 May 2002 (the date on which the UNTAET Administration ended and East Timor assumed full sovereignty and independence). The bill therefore fails to address:

(a) what is, or what does Parliament intend to be considered the valid applicable law for events which occurred during the period of Indonesian occupation (between December 1974 – 25 October 1999), and

(b) what is, the valid applicable subsidiary law for events which occurred during the UNTAET administration (25 October 1999 – 20 May 2002).

JSMP believes that unless these issues, and especially the question of what should be considered the valid applicable law for the period December 1974 – 25 October 1999 are addressed, the bill as drafted in its present form, will do little to solve the present crisis concerning identification of the applicable law in this country.

4. JSMP's Analysis and Comment

4.1 The Doctrine of Separation of Powers

Fundamental to the issue of determining the source of laws to be applied in Timor Leste, and the respective roles of the Legislature (National Parliament) and the Court in this respect, is an understanding of the ¨Separation of Powers¨. This doctrine is embodied in Sections 67 (Organs of Sovereignty) and 69 (Principle of Separation of Powers) of the RDTL Constitution.

The RDTL Constitution further provides that the National Parliament is the organ of sovereignty vested with responsibility for political decision making and the formulation and content of laws (Section 92), whereas the courts are responsible for the interpretation and enforcement of those laws (Sections 118 – 121). Where the intended meaning of an applicable law is certain and unequivocal, the clear duty of the courts is to apply those law according to that interpretation unless those laws are unconstitutional. Where there is an irreconcilable difference of opinion between the Courts as to the correct interpretation of a law, however, and where the interpretation of that law also involves a political element (such as the laws which should now govern events which took place during the 1974 - 1999 Indonesian occupation), the situation is slightly different. In those circumstances, JSMP believes it is appropriate for the National Parliament to intervene and resolve any confusion or uncertainty by promulgating new legislation.

4.2 What did UNTAET intend to be the subsidiary law applicable in East Timor following the promulgation of UNTAET Regulation 1999/1?

JSMP believes that the answer to this question is clear and unequivocal. In drafting Section 3 of UNTAET Regulation 1991/1 the intent of the UNTAET Administration was to introduce the *Laws of Indonesia* as being the subsidiary law which should apply in East Timor. To understand this, it is necessary to examine the historical development of the law in East Timor.

4.2.1 Historical Development of the Applicable Law in East Timor

The starting point here is the powers that were given to the Transitional Administrator following the ¨popular consultation¨ process and commencement of the UNTAET mandate in October 1999. Acting under Chapter 7 of the Charter of the UN, the Security Council in paragraph 1 of Resolution 1272 stated that it:

> " … Decides to establish, in accordance with the report of the Secretary-General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise *all legislative and executive authority, including the administration of justice*" (emphasis added)

The terms of this paragraph means that the UN-appointed Transitional Administrator, Sergio Vieira de Mello, became the Legislature, the Executive and the sole Judicial authority of the United Nations. This afforded him the authority to decide what would constitute the applicable law in East Timor. His first act was the promulgation of Regulation 1999/1 which established how he was to exercise his authority under Security Council Resolution 1272.

Section 3 of the Regulation 1991/1 sets out what would henceforth be the "applicable law in East Timor" until the "restoration of independence". Section 3.1 provides as follows:

> "… Until replaced by UNTAET Regulations or subsequent legislation of democratically established institutions of East Timor, *the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor* insofar as they do not conflict with standards referred to in Section 2, the fulfillment of the mandate given to UNTAET under United Nations Security Council Resolution 1272, or the present or any other Regulation and Directive issued by the Transitional Administrator." (emphasis added)

The passing of this Regulation was a deliberate act of law making in exercise of the authority vested in the Transitional Administrator as the law maker for East Timor. In accordance with the broad provisions of his mandate, the Transitional Administrator may lawfully have designated the legal regime of almost any country in the world to be the applicable law in East Timor.

The exercise of his authority in choosing a particular legal regime as the applicable law means that this deliberate legislative act has superseded the applicability of any other law which might otherwise have been applicable in the past, be that Portuguese or Indonesian law. The Court of Appeal in the case of Armando Dos Santos clearly recognised that in Regulation 1999/1, the Transitional Administrator had made a choice of applicable law for East Timor. The question of what law was applied is not just a legal question. It is also a question of fact.

4.2.2 Principles of Statutory Interpretation

Judges from both the common law and civil law traditions employ a number of standard rules, or ¨principles of statutory interpretation¨ when seeking to establish the meaning, or intent of the legislature when interpreting laws and regulations. The first, and fundamental principle is that courts must apply the ördinary and natural meaning¨ to terms which are unambiguous and clearly defined.

The applicabilty of this principle has been confirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Celebici case: [4]

> ¨In every legal system, whether common law or civil law, where the meaning of the words in the statute is clearly defined, the obligation of the judge is to give the words their clearly defined meaning and apply them strictly. This is the literal rule of interpretation. If only one construction is possible, to which the clear, plain or unambiguous word is unequivocally susceptible, the word must be so construed. .."

In JSMP´s view, the ordinary and natural meaning of the word "applied" is "*used*". Thus, in our respectful opinion, the proper role of the Court of Appeal in interpreting the meaning of Section 3 of Regulation 1991/1, was to determine what law *was used* in East Timor prior to 25 October 1999, and then to determine the appeal issue in accordance with that law. This is a question of historical fact, and does not demand any consideration by the Court of Appeal regarding whether the law that was *in fact used* prior to 25 October 1999 was valid under international law.

Given Indonesia was the *de facto* occupying authority in East Timor for 24 years, and that Indonesian, rather than Portuguese laws had *in fact* most recently been used or enforced by the courts prior to 25 October 1999, JSMP believes that the appropriate conclusion (had the Court of Appeal employed the ordinary and natural meaning of the term äpplied¨) would have been to find that Section 3 of Regulation 1991/1 unquestioningly referrred to the Law of Indonesia.

This interpretation is confirmed by one of the principal drafters of UNTAET Regulation 1991/1 Hansjoerg Strohmeyer who was the acting Principal Legal Advisor to UNTAET at the time the Regulation was drafted (Oct. 99 to Feb 2000).

In an article written for the University of *New South Wales Law Journal* in 2001, Strohmeyer states:

> "By Regulation No1999/1, UNTAET had, in effect decided that the laws which applied in East Timor prior to the adoption of the Security Council Resolution1272 (i.e., the Indonesian laws) would apply *mutatus mutandus* in so far as they were consistent with the internationally recognised human rights standards, and insofar as they did not conflict with the mandate given to the mission by the Security Council, or with any other subsequent regulation promulgated by the mission.
>
> The decision was made solely for practical reasons; first to avoid a legal vacuum in the initial phase of the transitional administration, and second, to avoid a situation in which

[4] *Prosecutor v. Delali et al*, Case No IT-96-21-t. 16 Nov. 1998, paras 160-162.

local lawyers, virtually all of whom had obtained their law degrees at domestic universities, had to be introduced to an entirely foreign legal system."

Strohmeyer then goes on to state in Footnote 5 to his article (page 173):

> "...The wording of 3.1 (the factual statement 'the laws applied' is used rather than 'the applicable laws') carefully avoids the retroactive legitimisation of the Indonesian occupation as a lawful legal regime in East Timor."

In JSMP´s view, the above comments make absolutely certain that the intent of UNTAET at the time was to introduce Indonesian law, and not that of any other country.

4.2.3 Additional Indicators that Indonesian Law was intended to be the Applicable Subsidiary Law

If the above were not enough, there are a number of further indicators – all of which point to the intent of the Transitional Administration as having been to import the law of Indonesia, rather than Portugal (or some other country) as the applicable subsidiary law. These include:

(a) May 5th Agreement -

The May 5th Agreement states in Appendix A: "Constitutional Framework for the Special Autonomy for East Timor" provides in Article 11: "Indonesian laws in force upon the date of entry into force of this agreement that fall within the competence of the Central Government, as defined in this Chapter, shall remain in force in SARET (the Special Autonomous Region of East Timor)".

This Article clearly evidences an acceptance on the part of Indonesia, Portugal and the United Nations that Indonesian law had applied in East Timor prior to 25 October 1999, and would continue to apply in East Timor. Further, as a signatory to this agreement, Portugal, under its own domestic law,[5] renounced the application of its laws in East Timor.

(b) Indonesian Laws Referred to in Section 3.2 of Regulation 1991/1 -

JSMP agrees with the reasoning of Judge Jacinta Correia da Costa in her dissenting opinion in the Court of Appeal decision. In interpreting legislation, Judges should examine the entire body of the law to place an Article in its appropriate context. Each Section is meant to be read as a part of the whole document, and *should not be read in isolation.* For this reason, JSMP believes the majority of the Court of Appeal erred in seeking to interpret the meaning of Section 3.1 of Regulation 1991/1 in isolation, and in failing to consider the relevance of subsection 3.2 which follows. Subsection 3.2 states:

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[5] *Portuguese Law regarding International Judicial Cooperation* (DL43/91 de 22/1) states in Title 1, Chapter 1 General Dispositions, Article 3, that the dispositions contained in the International Conventions, Treaties, and Pacts signed by the State and ratified by Parliament as international commitments, prevail over all national legal dispositions.

¨Without prejudice to the review of other legislation, the following laws, which do not comply with the standards referred to in Sections 2 and 3 of the present regulation, as well as any subsequent amendments to the laws and their administrative regulations, shall no longer be applied in East Timor.

- Law on Anti-Subversion;
- Law on Social Organisations;
- Law on National Security;
- Law on Mobilisation and Demobilisation;
- Law on Defence and Security.¨

Importantly, each of the five laws enumerated above exist in current Indonesian Law, and the Indonesian titles of those laws exactly matches the English used in Section 3.2.[6] None of the laws referred to in Section 3.2 have any counterpart in Portuguese Law. This is further, clear evidence that UNTAET intended Indonesian laws, and not the laws of any other country to apply. Further, if UNTAET had envisaged that Portuguese law should, or might apply, why did they expressly repeal laws which do not exist in that country?

(c) Abolition of the Death Penalty -

Section 3 of Regulation 1999/1 also expressly repeals the death penalty and states that henceforth it shall not apply in East Timor. As a matter of logic, the abolition of the death penalty must mean that the legal regime which UNTAET intended to import into East Timor must have been one which still exercises capital punishment. Again, this points to Indonesia which prescribes death as being the penalty for murder under Section 340 of the *Indonesian Criminal Code*. Again, it points away from Portugal, which did not in 1999, and still does not, have the death penalty in its statutes.

(d) UNTAET Regulations and Executive Orders -

There are a number of UNTAET Regulations and Executive Orders subsequent to Regulation 1991/1 which make express reference to the repeal, or non-applicability of Indonesian laws in East Timor. These include UNTAET Regulation 2000/30 which states:

> ¨ [This] regulation takes precedence over *Indonesian laws on criminal procedure* ….¨ (emphasis added)

Also included are Executive Order No 2002/2 (decriminalisation of defamation) and Executive Order No 2001/16 (decriminalisation of adultery), both of which state explicitly that the relevant Articles of the *Indonesian Criminal Code* no longer constitute criminal offences in East Timor and are not to be used as a basis for criminal charges.

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[6] Law on Anti-Subversion (Pencabutan Undang-undang Nomor II/PNPS/1963 Tentang Pemberantasan Kegiatan Subversi); Law on Social Organisations (Undang-undang 8/1985 Tentang Organisasi Kemasyarakatan); Law on National Security (Undang-undang 29/1954 Pertanahan Negara Republik); Law on Mobilisation and Demobilisation (Undang-undang 27/1997 Tentang Mobilisasi dan Demobilisasi); Law on Defence and Security (Undang-undang 20/1992 Kententuan-kententuan Pokok Pertanahan Keamanan Negara Republik).

Finally, and not least, evidence that UNTAET intended the Indonesian (and not the Portuguese) law to apply in the courts comes from the fact that the Transitional Administrator knew that the Courts were using Indonesian laws as the applicable subsidiary law during the term of the UNTAET mandate. If the Transitional Administrator not intended this to occur, then one would have expected intervention from him by way of a directive that the Courts should thereafter apply the laws of that other jurisdiction. This did not occur.

In JSMP´s view, the above arguments, taken together, demonstrate unequivocally that ¨the law applied in East Timor prior to 25 October 1999¨ and which the UNTAET Administration intended should form the subsidiary law to be applied during the term of the UNTAET Administration (October 1999 – 20 May 2002), are the Laws of Indonesia.

4.3 What law forms the applicable subsidiary law in East Timor today?

If it is accepted that the subsidiary law which the UNTAET Administration intended to be applied during their administration were the Laws of Indonesia, then it follows that the valid subsidiary law that applied in Timor Leste following Independence, and which continue to apply today are the laws of Indonesia.

This flows as a natural consequence of Section 165 of the RDTL Constitution which provides:

> "Laws and regulations *in force* in East Timor [as at the time of Independence] shall continue to be applicable on all matters *except to the extent* that they are inconsistent with the Constitution or principles contained therein". (emphasis added)

The drafters of the Constitution must be assumed to have understood that the operable subsidiary law in force at that time of Independence was Indonesian law, and the intended consequence of Section 165 was the continued application of those Indonesian laws.

4.4 What law should properly be applied by the courts when considering criminal charges, commercial transactions and other matters which took place during the 1974 - 1999 Indonesian occupation of East Timor?

The third issue arising from the Court of Appeal decision is what law validly applied in East Timor prior to 25 October 1999. It is a basic principle of statutory interpretation that unless a law expressly provides otherwise, it will only take effect *prospectively,* i.e. in the future. Section 8 of Regulation 1991/1 states that it shall be deemed to have entered into force as of 25 October 1999. As such, Regulation 1999/1 operates only to validate the system of law nominated or created by it upon the coming into force of that Regulation on 25th October 1999. It has no effect on the validity, or otherwise, of any body of law prior to that date.

That leaves open the question of what is the applicable law in East Timor *prior to* 25th October 1999? This is an uncertain and contentious issue, and depends, amongst other things on the legality or otherwise of the Portuguese and Indonesian occupations under International law. Those issues require careful consideration and JSMP has not reached a concluded opinion. It is clear, however, that the question must be addressed as a matter of urgency, and that the only unequivocal way of creating certainty is for the National Parliament to pass legislation declaring what that law should be.

5 Conclusions and Suggested Solutions

For the reasons set out in this paper, JSMP would argue that the Court of Appeal has wrongly interpreted and applied UNTAET Regulation 1999/1 in finding that Portuguese, and not Indonesian Law is the applicable subsidiary law in this country. In our view, the dissenting opinion of Judge da Costa in the dos Santos Appeal, and the subsequent decision of the Special Panel for Serious Crimes represent the correct interpretation of the applicable subsidiary law.[7]

That is, JSMP subscribes to the view that the clear intention of UNTAET in promulgating Regulation 1991/1 and subsequent Regulations was to introduce the Law of Indonesia in East Timor from 25 October 1999. Further, in accordance with Section 165 of the Constitution, those Indonesian laws remain in effect until such time as the democratically elected Government of East Timor has them repealed, or promulgates new East Timorese laws to replace them.

JSMP submits that, in view of the current crisis facing the courts in East Timor, it may now be appropriate for the National Parliament to intervene and provide certainty regarding the source and basis of applicable law by exercising its Constitutional power to do so.

As stated previously, under the Separation of Powers doctrine enshrined in Section 69 of the Constitution, the Parliament or legislature is the organ of sovereignty responsible for deciding the law which is to be applicable in East Timor, and it is the responsibility of the Courts to give effect to the will of Parliament through interpreting and enforcing its laws. Parliament´s sovereignty in this regard is found in Section 92 of the Constitution, which states:

> ¨The National Parliament is the organ of sovereignty of the Democratic Republic of East Timor that represents all Timorese citizens and *is vested with legislative supervisory and political decision making powers*." (Emphasis added)

Whether the law of Portugal, Indonesia, or a combination thereof, should be the applicable subsidiary law in East Timor is, given the history, and in the context of this county, clearly a political decision. It is a decision which should, and JSMP would say, can, only be validly made by the popularly-elected legislature.

5.1 Proposals for Clarification and Certainty of Law

In relation to past events –

In relation to past events, JSMP makes the following recommendations:

(a) In regard to what should be considered the valid applicable law in East Timor prior to 24 October 1999, JSMP submits that it may be a practical solution for the National Parliament to

[7] JSMP also believes that the Court of Appeal have also erred in their findings that UNTAET Regulation 2000/15 is unconstitutional, and therefore cannot be used in the prosecution of Crimes Against Humanity, and also, in their finding that the criminality proved against Armando Dos Santos amounts to Genocide, either under international law, or under Portuguese criminal law. The reasons for these views are set out in a separate JSMP report to be released shortly.

draft legislation confirming the application of Indonesian laws (except those which infringe internationally recognised human standards) [8] in East Timor during the period of Indonesian occupation.

(b) In relation to what should be considered the valid applicable law in East Timor from the commencement of the UNTAET Administration on 25 October 1999 onwards, JSMP submits that the Parliament may wish to draft legislation declaring that the Law of Indonesia is to be considered the valid subsidiary law.

In relation to the future applicable law –

JSMP accepts that it is of course open to Parliament to adopt Portuguese law (or the law of some other country), rather than that of Indonesia, as the applicable subsidiary law in this country - should they choose to do so. However, to introduce that type of change would need to be carefully planned and implemented. In JSMP´s view, this would be an extremely complex exercise, and should not be entered into lightly.

[8] JSMP suggests those exclusions should be defined as being Applications of Indonesian Law that violate any of the International Declarations, Conventions and Covenants found in Section 2 of UNTAET Regulation 1991/1.